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3. The New Hampshire statute violates appellant's rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution in that it deprives appellant of property without due process of law.

4. The New Hampshire statute violates appellant's rights as guaranteed by the Fourteenth Amendment to the Constitution because it denies appellant the right of equal protection of the law.

Statement of the Matter Involved.

This case involves the constitutionality of a statute of the State of New Hampshire known as "An Act Relating to Political Advertising," Chapter 185 of the Session Laws of 1945. The said Chapter 185 amends Chapter 42 of the Revised Laws of the State of New Hampshire by providing as follows:

> "1. Political Advertising. Amend section 6, chapter 42 of the Revised Laws, by striking out said section and inserting in place thereof the following: 6. Political Advertising. No person shall publish, or cause to be published, in a newspaper or other periodical any paid matter which is designed or tends to aid, injure or defeat any candidate for public office, or a constitutional amendment, or any other question submitted to the voters, unless the name of the chairman or secretary, or the names of two officers of the political or other organization inserting the same, or the name of some voter who is responsible therefor, with his residence and the street and number thereof, if any, appear in the nature of a signature. Such matter inserted in reading columns shall be marked at the beginning thereof in a distinctive type 'Political Advertisement.' No person or corporation, within this state, operating a radio station or network of stations shall broadcast any such paid political matter without first announcing the person or committee paying therefor. Any person who violates, or in any way knowingly aids, or abets the violation of, any provision of this section shall be fined not more than one hundred dollars, or imprisoned not more than sixty days.

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"2. Maximum Charges for Political Advertising. Amend section 9, chapter 42 of the Revised Laws by striking out said section and inserting in place thereof the following: 9. Payments for Publication. No person or corporation, within the state, publishing a newspaper or other periodical or operating a radio station or network of stations shall receive for political advertising or for political broadcasts, a rate in excess of the rate or rates regularly charged by such person or corporation for commercial advertising or for commercial broadcasts of similar character and classification and no candidate or political committee shall pay for political advertising or broadcasts any rate or charge in excess of such rate or rates regularly charged.

"3. Filing of Rates. Amend chapter 42 of the Revised Laws by inserting after section 9 the following new section: 9-a Rates to be Filed. Every person or corporation, within this state, publishing a newspaper or other periodical, or operating a radio station or network of stations, shall file with the secretary of state for public inspection a schedule or schedules showing the rates for commercial advertising and commercial broadcasts. Any such schedule may be changed or amended by filing a new or amended schedule with the secretary of state, but such new or amended rates shall not be effective until thirty days after filing.

"4. Takes Effect. This act shall take effect upon its passage.

(Approved May 18, 1945.)"

Appellant publishes in Portsmouth, New Hampshire, a aily newspaper, The Herald. It has always been the pol- y of the Herald to charge a higher rate for political ad- ertising than for ordinary commercial advertising.

On October 30, 1945, in connection with the City elections be held at Portsmouth, New Hampshire, the Chairmen nd Secretaries of the Democratic and Republican Commit- e requested The Herald to publish certain political adver- sements in The Herald. The Herald published the politi- al advertisements and charged for them in accordance with s established rates for political advertising.

Appellant then filed a petition for a declaratory judgment requesting the Superior Court, Rockingham County, New Hampshire, April Term, 1946, to adjudge and decree its "rights under and the constitutionality of chapter 185 of the Sessions Laws of 1945." The questions of law raised by appellant's petition were reserved and transferred to the Supreme Court of New Hampshire without ruling on May 8, 1946, by Stephen N. Wheeler, Presiding Judge of the Superior Court.

On June 27, 1946, the Supreme Court of New Hampshire, in a three to two decision, declared Chapter 185 of the Session Laws of 1945 to be constitutional. Appellant filed a Motion for Rehearing in the September Term, 1946, of the Supreme Court of New Hampshire, and, on September 3, 1946, the Supreme Court of New Hampshire denied this motion. In the October Term, 1946, the Chief Justice of the Supreme Court of New Hampshire signed a certificate that appellant had raised Federal questions in its original petition and motion for rehearing by attacking the constitutionality of Chapter 185 on the ground that it violated the freedom of the press and freedom of contract and deprived appellant of its property, without due process of law, in violation of the Fourteenth Amendment to the Constitution and that the Supreme Court of New Hampshire had considered these questions.

Appellant then filed an appeal in this Court. This Court, on January 6, 1947, dismissed the appeal for want of a substantial federal question.

This Court Has Jurisdiction.

This Court has jurisdiction upon appeal to review the decision of the Supreme Court of New Hampshire under Section 237 of the Judicial Code, 28 U. S. C., Sec. 344.

Reasons Relied Upon for Granting the Appeal.

Appellant respectfully submits that this case does present a substantial federal question because the New Hamp-

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shire statute violates the guaranties of the First, Fifth and Fourteenth Amendments of the Constitution of the United States.

1. The business of newspapers is the gathering and dissemination of information in the form of news, editorial comment and advertising. Newspapers are dependent, in large measure, for the conduct of their business on the revenue from the advertising published therein.

For many years it has been, and now is, substantially if not universally, the custom of the newspapers of the United States, to sell their publications to subscribers and readers at far less than the cost of production, with the result that circulation revenue meets only a portion of the cost which newspapers must incur to perform the function of the press.

In order to sell newspapers in that manner and so as to give the widest dissemination to the information which they offer, it is necessary to depend on advertising revenues to meet the major cost of production. Any factor which affects advertising revenue correspondingly and directly affects the ability of newspapers to serve their readers and to perform their duties and functions to the public.

If a state legislature can regulate the rate a newspaper may charge for its advertising, the legislature can set that rate at any point. The legislature can then use its control over advertising rates to control the press. As said by Mr. Justice Holmes:

> "A power over a man's subsistence amounts to a power over his will." *Evans* v. *Gore*, 253 U. S. 245 (1920) at page 265.

Under the First and Fourteenth Amendments, state legislatures have no power to control the press in this manner.

In *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), this Court recognized that the power to control the press is inherent in the exercise of power to control its advertising revenue and held that a Louisiana state tax on advertising appearing in all publications published in that state having a circulation of 20,000 or more copies per week was an unconstitutional restraint on the press. This Court said:

> "It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation." (297 U. S. at pp. 244-245.)

And, in the present case, regulation of the rate to be charged for political advertising would restrain the press by curtailing its revenue.

This statute does not place a financial burden on all businesses alike. It was designed to curtail the revenue of only two businesses—both important media for disseminating information. Therefore, this case does not come within the well-established rule that the "publisher of a newspaper has no special immunity from the application of general laws." This Court held, in *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), that

> "Freedom of press, freedom of speech, freedom of religion are in a preferred position." (319 U. S. at page 115.)

Under that decision, a statute which singles out the press and radio and seeks to control them through controlling important sources of revenue clearly violates the First Amendment.

The New Hampshire statute also restrains the press by laying down a condition precedent to the right to publish political advertising. A publisher has the right to publish whatever political advertising he desires. This statute which lays down conditions under which he must publish such advertising restricts his right in violation of the First Amendment. As was said in *Near* v. *Minnesota*, 283 U. S. 697 (1931) at page 720, if the publisher has a right to publish without previous restraint, that right cannot be deemed to be dependent upon his doing something else, i.e., in this case publishing political advertising at a rate fixed by the legislature. Merely characterizing the publishing of a newspaper as a business does not permit an invasion of the constitutional immunity against restraint. *Near* v. *Minne-*

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sota, supra, at page 720. The decision of the New Hampshire Supreme Court is in direct conflict with the rule.

The New Hampshire statute differs from the price fixing statutes sustained by this Court in *Nebbia* v. *New York,* 291 U. S. 502 (1934), and *Olsen* v. *Nebraska,* 313 U. S. 236 (1941), in that its effect is to restrain and regulate the press. Here the state's police power must be weighed against the liberties secured by the First and Fourteenth Amendments. As this Court said in *Schneider* v. *Irvington,* 308 U. S. 147 (1939):

> "Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion." (308 U. S. at page 160.)

And, as this Court further stated in *Bridges* v. *California,* 314 U. S. 252 (1941):

> "Moreover, the likelihood, however great, that a substantial evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial,' Brandeis, J., concurring in Whitney v. California, supra (274 U. S. 374, 71 L. ed. 1105, 47 S. Ct. 641); it must be 'serious,' id. 376. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. Schneider v. Irvington, 308 U. S. 147, 161, 84 L. ed. 155, 164, 60 S. Ct. 146.
>
> "* * * For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." (314 U. S. at pages 262-263.)

The statute in question was designed to secure free and equal elections in New Hampshire. There was no showing, however, that the unregulated use of political advertise-

ments in newspapers and on the radio constituted a substantial threat to free and honest elections that would justify the legislature in restraining the press. This curtailment of freedom of the press was unwarranted and the statute should be declared unconstitutional.

2. The New Hampshire statute impairs appellant's right of freedom of contract and deprives appellant of property without due process of law in violation of the Fifth and Fourteenth Amendments. It does not meet the test laid down in *Nebbia* v. *New York, supra,* in which this Court stated that:

> "* * * the guaranty of due process, * * *, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." (291 U. S. at page 525.)

First, the New Hampshire Legislature, in establishing the maximum rate for political advertising at a rate not in excess of that charged for commercial advertising of similar character and classification, failed to consider that the cost factors entering into the fixing of prices for advertising are entirely different in political advertising than in commercial. Therefore, as Chief Justice Marble of the New Hampshire Supreme Court said in his dissenting opinion (in which Justice Johnston concurred) "the statute must be held invalid because of its arbitrary features." Chief Justice Marble further stated:

> "Judicial notice may properly be taken of the fact that political advertising, though extensive, is temporary. Moreover, the statute affords no protection to publishers of political advertisements against liability for libelous statements contained therein (see *Commonwealth* v. *Company,* 249 Mass. 477, 482), and the editorial scrutiny of 'copy' submitted by a candidate for office, in order to insure its freedom from defamatory matter, may entail more labor than that required in the case of ordinary commercial advertisements.

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"The statute prescribes no method for determining whether the commercial rate it arbitrarily fixes as adequate for the service rendered political advertisers is reasonable. There is no presumption that it is. *Sharon Herald Co.* v. *County*, 132 Pa. Superior Ct. 245, 251. See *Commonwealth* v. *Company, supra.*"

(The majority opinion and dissenting opinion of the New Hampshire Supreme Court appear on pages 14-22 of Appellant's Statement As to Jurisdiction.)

Secondly, the "means selected" does not have "a real and substantial relation to the object sought to be attained." The object sought to be attained by the New Hampshire Legislature was free and equal elections. Regulation of the rate a newspaper may charge for political advertising is not a reasonable method of obtaining this objective.

3. The New Hampshire statute violates appellant's rights as guaranteed by the Fourteenth Amendment because it denies appellant the right of equal protection of the law. It regulates the rates for political advertising that may be charged by newspapers and radio stations but does not regulate the rates to be charged by other media of advertising. Under the Fourteenth Amendment, a state may resort to classification for the purposes of legislation but the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The classification here is arbitrary for other media, such as billboards, posters, and direct mail, are widely used for political advertising. There is no reasonable basis for assuming that newspapers and radio stations alone may charge excessive rates for political advertising or may discriminate against certain candidates. Moreover, this classification clearly has no relation to the object of the legislation—fair and equal elections. The classification is so arbitrary and unreasonable that the statute denies appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution.

CONCLUSION.

For the foregoing reasons it is respectfully urged
this petition for a rehearing be granted and that the ju
ment of the Supreme Court of New Hampshire be rever

Respectfully submitted,

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I, Elisha Hanson, attorney for the appellant, do he
certify that the foregoing petition for a rehearing of
cause is presented in good faith and not for delay.